

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(Washington and Watkinsville, Georgia))

MM Docket No. 01-281
RM-10287

RECEIVED

DEC 11 2001

To: Chief, Mass Media Bureau
Policy and Rules Division
Allocations Branch

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CONTINGENT REPLY TO COUNTERPROPOSAL

Southern Broadcasting Companies, Inc. ("SBC"), licensee¹ of WXKT(FM), Channel 261A, Washington, Georgia, by its attorneys, and pursuant to Sections 1.415 and 1.420 of the Commission's Rules, hereby respectfully replies to the Counterproposal which may have been filed² by New Tracks Media ("New Tracks") in response to the Commission's *Notice of Proposed Rule Making – Washington and Watkinsville, Georgia*, DA 01-2320, released October 5, 2001 ("NPRM"). Replies are due by December 11, 2001, so this pleading is timely filed. For the reasons set forth in Footnote 2, SBC is filing this reply on a contingent basis in the event the

1 At the time SBC filed its petition for rule making in this proceeding, Cumulus Licensing Corp. ("Cumulus") was licensee of WXKT. On September 29, 2001, the Commission granted an application (File No. BALH-20010713AAO) for consent to assignment of license of WXKT to SBC. The application was consummated November 15, 2001.

2 On November 20, 2001, New Tracks by mail served a copy of its counterproposal on undersigned counsel; however, counsel can find no evidence that the counterproposal was ever filed with the Office of the Secretary. Where SBC's Comments are available on the Commission's Electronic Comment Filing System ("ECFS"), New Tracks' are not. Therefore, it appears that New Tracks' counterproposal is not properly before the Commission. It is possible that New Tracks' counterproposal was in fact timely received by the Commission's mail processing facility and was delayed in delivery to the Commission's staff by the new precautions taken after the events of September 11. In order to expedite the Commission's consideration of SBC's proposal, SBC will provide for the staff's convenience a copy of the counterproposal that was served on undersigned counsel upon request.

No. of Copies rec'd
List ABCDE

at 4

New Tracks counterproposal turns up in the Commission's system. The *NPRM* proposes to amend the Table of Allotments (47 C. F. R. §73.202 (b)) to change the allotment of FM Channel 261A from Washington, Georgia, to Watkinsville, Georgia, as its first local service with a concurrent modification of the license of WXKT(FM)(Facility ID No. 51120), to operate on Channel 261A at Watkinsville. New Tracks counterproposes the allotment of Channel 261A to Gray, Georgia, as its second local service. The New Tracks counterproposal is fatally defective on several grounds, and must be dismissed without further consideration. Even if New Tracks' counterproposal were to survive dismissal, it is comparatively inferior to the SBC proposal, since New Tracks proposes a 24th local service to the Macon, Georgia, Urbanized Area and a second local service to Gray; whereas SBC proposes a first local service to the independent community of Watkinsville. In reply to the New Tracks counterproposal, the following is shown:

Background

SBC has requested the Commission to delete Channel 261A from Washington and reallocate it to Watkinsville, Georgia, as a first local service, with a concurrent modification of the license of WXKT to operate on Channel 261A at Watkinsville. In the *NPRM*, the Commission requested SBC to submit additional information to show that Watkinsville is independent of the Athens-Clarke County Urbanized Area. On November 26, 2001, SBC filed its supporting comments which includes an analysis addressing the criteria set forth in *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988). SBC also expressed continuing interest in the use of Channel 261A at Watkinsville. New Tracks possibly filed a counterproposal, which is fatally defective, as detailed in the following paragraphs.

Specific Defects in Counterproposal

Failure to Properly File Counterproposal. As explained in Footnote 2, counsel can find no evidence that New Tracks' counterproposal was filed with the Office of the Secretary. If New Tracks counterproposal was never filed, these reply comments will become moot. However, if New Tracks' counterproposal was timely received by the Commission, but delayed in processing, SBC shows herein that it should be dismissed or returned as unacceptable for filing.³

The Use of Channel 261A at Gray, Georgia, Is Precluded by Several Constraints.

New Tracks claims, "all minimum distance separation requirements of Section 73.202(b) are met from the reference site," except for a site restriction to clear WXKT at Washington, Georgia, and WSNT-FM, Sandersville, Georgia. There is an 88.18 km short space to WQMJ, Channel 261A, Forsyth, Georgia, which New Tracks proposes to cure by the substitution of Channel 279A for Channel 261A at Forsyth, Georgia. To make this substitution, it is necessary to substitute Channel 278A for Channel 279A at Irwinton, Georgia, and to modify the license of WVKX, Irwinton, to operate on Channel 278A. It is also necessary to downgrade WVEE, Atlanta, Georgia, from Channel 277C to Channel 277C0. New Tracks submits a copy of a letter from Wilkinson Broadcasting, licensee of WVKX, agreeing to change channels conditioned on New Tracks paying the costs of the change. There is no similar letter from the licensee of WQMJ and there is no evidence of assent from the licensee of WVEE. Additionally, there are two applications pending for the use of Channel 279A at Cusseta, Georgia, and there is no evidence

³ At Counterproposal, p. 2, New Tracks explains that on September 1, 2001, it filed a petition for rule making to assign Channel 261A to Gray, Georgia, as its second aural service. On October 4, 2001, SBC filed a petition asking the Commission to dismiss the New Tracks proposal. At Counterproposal p. 4, New Tracks responds to SBC's petition. As New Tracks' petition for rule making is subsumed in its counterproposal, this reply addresses its response to the SBC petition to dismiss.

that New Tracks has an agreement with the applicants to change their transmitter sites. Any of the above defects is fatal, but when taken together, it is clear that (should it surface) New Tracks' counterproposal must be promptly returned as unacceptable and not placed on public notice. In addition, SBC shows *infra* that its proposal for first local service to Watkinsville is preferred on Section 307(b) grounds to a second local service to Gray and a 24th local service to the Macon, Georgia, Urbanized Area.

WVEE, Atlanta, Georgia. New Tracks' counterproposal, in violation of Commission policy, proposes to downgrade WVEE(FM), Atlanta, Georgia, from Channel 277C to Channel 277C0. In *1998 Biennial Regulatory Review—Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, 65 Fed. Reg. 79773, published December 20, 2000 (at ¶28), the Commission made it clear that "...reclassification may be initiated **only through an original petition for rule making** to amend the FM Table of Assignments, and **not through comments or counterproposals**" [bold added]. Moreover, counsel for WVEE has informed undersigned counsel that WVEE objects to a forced downgrade, and is filing reply comments in this proceeding. New Tracks' violation of the Commission's reclassification procedure and WVEE's objection to being downgraded to Class C0, standing alone, vitiates New Tracks' proposal, but there are other serious defects which must be noted.

WVKX, Irwinton, Georgia. New Tracks submits a letter purportedly from Stan Carter of "Wilkinson Broadcasting Licensee of WVKX⁴" stating that it is acceptable to Wilkinson to move WVKX from 103.7 (Channel 279A) to 103.5 (Channel 278A) and to construct a "new transmitter/tower complex for WVKX at a new site," and that H. David Hedrick of New Tracks

4 The Commission's CDBS shows the licensee of WVKX to be "Wilkinson Broadcasting, Inc." referred to herein as "Wilkinson."

has conveyed his willingness to pay for the costs associated with the move. However, as a practical matter, Wilkinson should be aware that, in the unlikely event Channel 261A were allotted to Gray, Georgia, there would be no assurance that New Tracks (or anyone else, for that matter) would reimburse Wilkinson. Mutually exclusive applications for new FM channels are resolved through the auction process, so there is no guarantee that New Tracks will obtain the channel and thus be obligated to reimburse Wilkinson. If New Tracks or some other entity did not submit an application and obtain a construction permit for Channel 261A at Gray, or simply refused to pay prompt reimbursement, Wilkinson might never be reimbursed for relocating its station.

WQMJ, Forsyth, Georgia. New Tracks' proposal also requires the reallocation of WQMJ, Forsyth, Georgia, from Channel 261A to 279A requiring the applicants for Channel 279A at Cusseta, Georgia (see *infra*) to obtain new transmitter sites. New Tracks has also proposed to reimburse the expenses of relocating WQMJ, but did not provide any evidence from the licensee of WQMJ that it was willing to relocate its transmitter site to clear the Cusseta applications. The attached Technical Statement demonstrates that New Tracks' proposal for WQMJ is short spaced to the Cusseta applicants, thus making New Tracks' counterproposal unacceptable.

Cusseta, Georgia, Applications. New Tracks mentions only in passing the two applications for the use of Channel 279A at Cusseta, Georgia,⁵ that are in conflict with its Counterproposal and would require amendments to propose new sites. The Technical Statement shows that the usable area for a transmitter site for the Cusseta application would be decreased

5 See applications of Cusseta Broadcasting Corp. (File No. BPH-19930701MG, Fac. ID No. 14761) and Signature Broadcasting, Ltd. (File No. 19930701ME, Fac. ID No. 60372).

greatly and that most of the usable area would fall within the boundaries of Fort Benning, Georgia. New Tracks ignores precedent that the Commission will not require these applicants to change their transmitter sites. Section 73.208(1)(1)(i) and (a)(3) of the Rules require a rulemaking petitioner to protect previously filed applications. See *Conflicts between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *recon. granted in part and denied in part*, 8 FCC Rcd 4743 (1993). See also *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993). See also *Rose Hill, Trenton, Aurora and Ocracoke, North Carolina*, 15 FCC Rcd 10739(2000).

Argument. It is axiomatic that counterproposals must be in compliance with the Commission's rules and policies on the date they are filed, or they must be dismissed or returned as unacceptable. See *Rockport, Gregory, Alice and Armstrong, Texas* 4 FCC Rcd 8075 (1989). As New Tracks' Counterproposal is rife with defects, it must be suffer the fate of dismissal.

Ownership of SBC

Under "Additional Issues," New Tracks "reserves the right" to address other issues which it believes the Commission should consider, including "concentration of control" by SBC. This rule making proceeding is limited to ventilating the single issue of which of the two proposals represents a preferential arrangement of allotments under Section 307(b) of the Communications Act of 1934, as amended. A rule making proceeding is not a forum in which to debate issues of multiple ownership. Therefore, any such comments by New Tracks are irrelevant to the case at bar and may not be considered. If New Tracks were to raise such issues in its reply comments, they could not be considered since SBC would not have had an opportunity to respond to them in its reply comments which must be limited to responding to the matters raised in the original

comments.⁶ But, in an abundance of caution, SBC reiterates that it can and will make the appropriate showing of compliance with Section 73.3555 of the Rules at the appropriate time and in the appropriate manner.

Section 307(b) Analysis

SBC is providing a Section 307(b) comparison between its proposal for first local service to Watkinsville and New Tracks' counterproposal for a second local service to Gray, Georgia and 24th service to the Macon, Georgia, Urbanized Area. In determining which proposal will better serve the public interest, the Commission is guided by the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). Under priority three, first local service, Watkinsville warrants a preference for bringing a first local service to Watkinsville over a second local service to Gray.⁷ Under priority 4, other public interest matters, Watkinsville merits a preference over Gray due to its larger population, contrary to New Tracks' erroneous claim that "...Gray has a larger population than Watkinsville." The 2000 Census shows Watkinsville with a population of 2,097, and Gray with a population of 1,811 (See Technical Exhibit).

Without any foundation in fact or law, New Tracks claims (at Counterproposal p. 3) that "Gray has no local service, even though there is a licensed station." This statement is merely unsupported argument and incorrect. Whether or not New Tracks agrees, it is undisputed that the licensed station, i.e., WJZY-FM, is licensed to operate at Gray on Channel 243C3, which renders New Tracks' proposal one for second local service to Gray. Matters touching on the

⁶ Section 1.415 (c) of the Rules provides: "A reasonable time will be provided for filing comments in reply to the original comments, and the time provided will be specified in the notice of proposed rulemaking."

⁷ See Technical Statement, Attachment B.

programming of WJZY-FM should be addressed at renewal time, not in the context of a rule making proceeding.

New Tracks notes that the *NPRM* states that the proposed Watkinsville service area already receives five full time services where Gray receives only four (Counterproposal , p. 5); however, New Tracks ignores that its proposal is located within the Urbanized Area of Macon, Georgia (2000 Bibb County population 153,887). The Technical Statement shows that a total of 11 AM, 12 FM and 5 TV facilities are licensed to communities within the Macon Urbanized Area. As New Tracks did not provide a showing pursuant to *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) (as did SBC in its Comments to demonstrate that Watkinsville is independent of the Athens Urbanized Area), Gray must have attributed to it all the stations licensed to communities in the Macon Urbanized Area.

In changing its community of license, WXKT proposes to relocate its transmitter site. The allocation site meets all known constraints. As Washington will continue to enjoy service from WLOV, SBC's proposal will not deprive Washington of its only local transmission service. Watkinsville would be entirely covered by a 70 dBu or better signal from WXKT. Thus, modification of the license for WXKT would be consistent with the Commission's city-grade contour coverage requirements.

The Commission's priorities for assigning FM allotments are set out in *Revision of FM Assignment Policies and Procedures, supra*. They are: (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). Were New Tracks able to survive the many fatal defects noted *supra*, the comparison of communities is overwhelmingly in Watkinsville's favor. The reallocation of Channel 261A as a first local service to Watkinsville (an independent community with larger

population) would result in a preferential arrangement of allotments over the allotment of a second local service to Gray and a 24th local service to the Macon Urbanized Area. Thus, the requirements of Section 307(b) and the public interest would be best served by the allotment of Channel 261A to Watkinsville.

WHEREFORE, SBC respectfully requests the Commission to amend Section 73.202(b) of the Commission's Rules, as follows:

<u>GEORGIA</u>	<u>Present</u>	<u>Proposed</u>
Washington	261A	--- ⁸
Watkinsville	---	261A

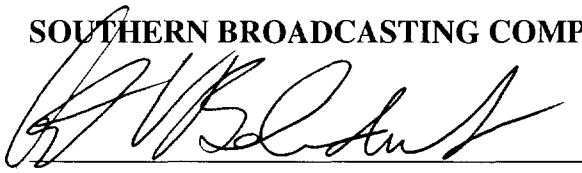
Conclusion

If the Commission so modifies the license of WXKT, SBC will timely file an application for minor change construction permit to operate WXKT at Watkinsville, and upon grant thereof, SBC will construct the new facilities and operate them.

Respectfully submitted,

SOUTHERN BROADCASTING COMPANIES, INC.

By:


for Gary S. Smithwick
Its Attorney

SMITHWICK & BELENDIUK, P.C.

5028 Wisconsin Avenue, N.W.

Suite 301

Washington, D.C. 20016

(202) 363-4560

December 11, 2001

⁸ WLOV(AM) is to remain licensed to Washington.

CERTIFICATE OF SERVICE

I, Kelly Waltersdorf, a paralegal in the law offices of Smithwick & Belendiuk, P.C., hereby certify that on December 11, 2001, copies of the foregoing contingent reply to counterproposal were sent via First Class Mail, postage pre-paid to the following:

R. Barthen Gorman, Esq.*
Allocations Branch – Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
Washington, DC 20554

H. David Hedrick
New Tracks Media
P. O. Box 27
Gray, GA 31032

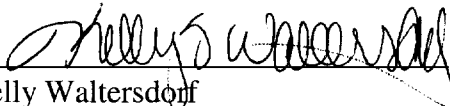
John D. Poutasse, Esq.
Leventhal Senter & Lerman, P.L.L.C.
2000 K Street, NW - Suite 600
Washington, DC 20006-1809
(Counsel for WVEE, Atlanta, GA)

Cusseta Broadcasting Corporation
1000 Potomac Street, N.W.
Washington, DC 20007

Signature Broadcasting, Ltd.
C/o Shirley Thrasher
1221 Azalea Court
Columbus, GA 31906

Radio Station WQMJ
C/o Roberts Communications, Inc.
6070 Rock Springs Road
Lithonia, GA 30038

Radio Station WVKX
C/o Wilkinson Broadcasting, Inc.
104 High Hill Street
P. O. Box 569
Irwinton, GA 31042


Kelly Waltersdorf

Southern Broadcasting Companies, Inc.

WXKT-FM CH-261A

Washington - Watkinsville, Georgia

Technical Statement

December 10, 2001

The Commission has before it a Counterproposal submitted by H. David Hedrick, dba New Tracks Media (NTM), to add channel 261A to Gray, Georgia, substitute channel 279A for 261A at Forsyth, Georgia, substitute channel 278A for 279A at Irwinton, Georgia and down class WVEE, Atlanta, Georgia from channel 277C to channel 277C0.

This technical statement clearly shows the petition filed by NTM is technically flawed.

Short Spacing to Cusseta, Georgia:

NTM proposes to change station WQMJ, Forsyth, Georgia from channel 261A to channel 279A. This proposal is technically flawed. NTM's proposed coordinates are 32-58-27 N. latitude - 083-52-02 W. longitude. Exhibit 1 clearly shows this proposal is short spaced to two applicants for channel 279A at Cusseta, Georgia which must be protected.

Also noted is the clear area would be decreased greatly for channel 279A at Cusseta, Georgia and that most of the clear area would fall within the boundaries of the US Army's Reservation at Fort Benning, Georgia. See exhibit-2

Watkinsville vs. Gray Population:

NTM stated in its counterproposal the population of Gray, Georgia was greater than the population of Watkinsville, Georgia. In fact the opposite is true. According to the 2000 US Census data, the population of Gray is 1,811 persons and the population of Watkinsville is 2,097 persons.

First vs. Second Local Service:

Watkinsville at present has no local service while Gray has local service provided from FM station WJZY-FM, facility ID# 06944.

City Grade contour over Watkinsville:

From the proposed site of SBC, WXKT, operating with a HAAT of 100m and an ERP

Of 6kw, would provide a 70 dBu (3.16mV/M) contour over the entire city of Watkinsville, Georgia. See exhibit 3

Macon Urbanized Area:

The Macon, Georgia urbanized area consists of Bibb, Peach, Houston and Jones counties. NTM's proposal at Gray, Jones County, Georgia is located within this urbanized area. At no time within its counterproposal did NTM mention this fact and no "Tuck" analysis was a part of that proposal. A total of 11 AM, 12 FM, and 5 TV facilities are licensed within the Macon urbanized area. See exhibit 4.

Conclusion

The attached technical statement and exhibits clearly shows the proposal set forth by New Tracks Media is technically flawed and therefore should be dismissed without consideration.

Clyde Scott, Jr.
EME Communications
293 JC Saunders Road
Moultrie, GA 31768
229-890-2506

DECLARATION AND QUALIFICATIONS OF PREPARER

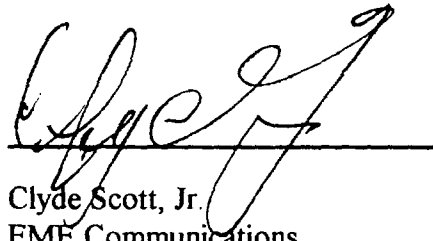
State of Georgia)
City of Moultrie)
Colquitt County)

§

Clyde Scott, Jr. ,Under penalty of perjury, declared and says he is a broadcast engineer and president of EME Communications. He has been engaged to prepare the attached technical exhibit.

That his qualifications are a matter of record before the Federal Communications Commission and has been active in the broadcast industry since 1965 and in broadcast engineering since 1972. That He is the holder of General Radiotelephone license no. PG-6-30133.

That the attached technical was either prepared by him or under his direct supervision. All material and exhibits hereto are believed to be true and correct.

A handwritten signature in black ink, appearing to read 'Clyde Scott, Jr.', is written over a horizontal line.

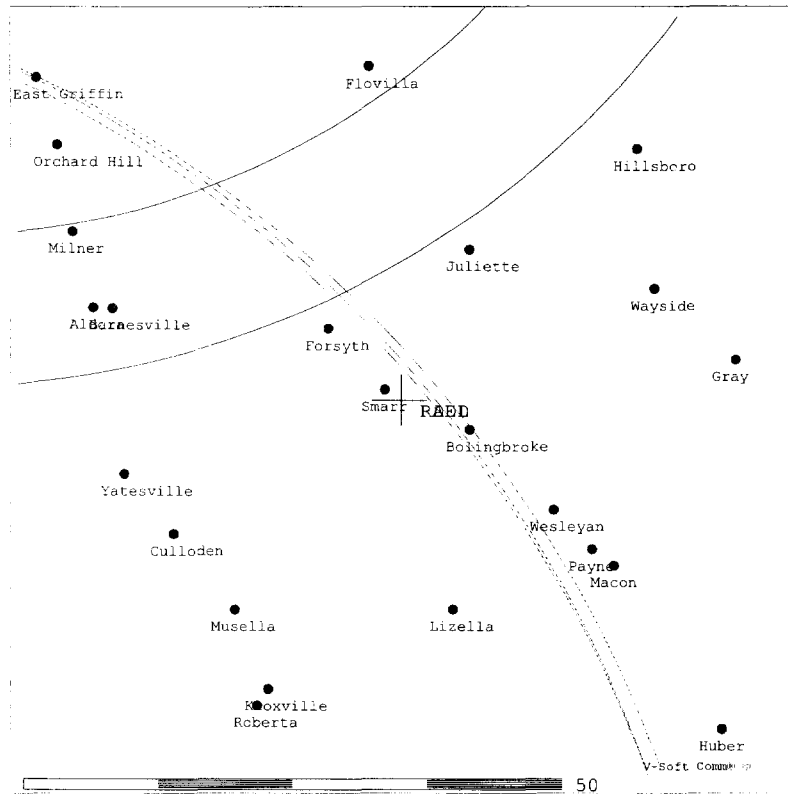
Clyde Scott, Jr.
EME Communications

EXHIBIT - 1
CHANNEL 279A AT FORSYTH, GEORGIA.

FMCONT^(TM) LOCATE STUDY

Ch 279 A
103.7 MHz

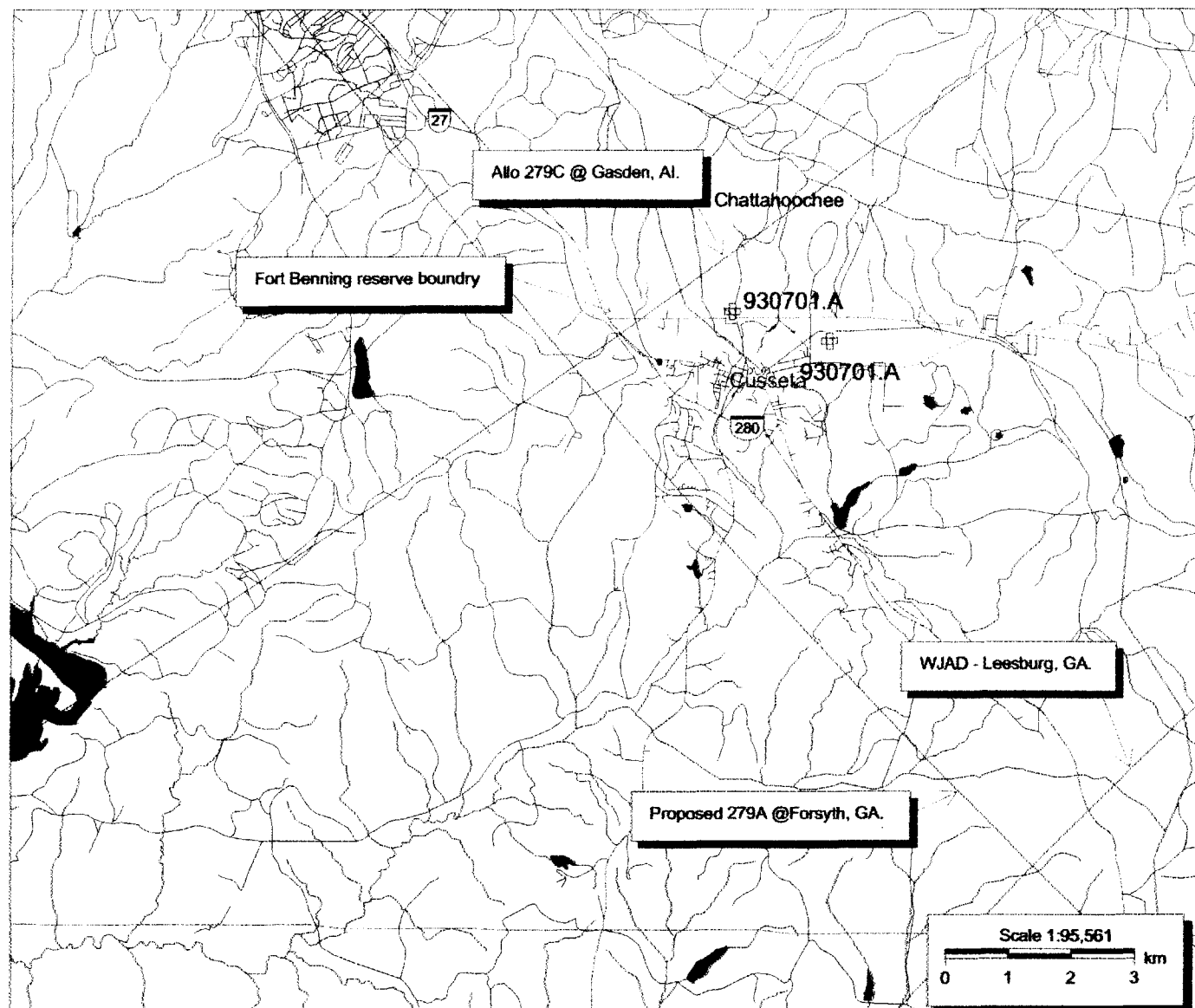
N. Lat. 32 58 27
W. Lng. 83 52 02



Call	CH#	Location		D-KM	Azi	FCC	Margin
RADD	279A	Forsyth	GA	0.00	0.0	115.0	-115.00
RDEL	279A	Irwinton	GA	0.00	0.0	115.0	-115.00
WVKX	279A	Irwinton	GA	64.63	99.2	115.0	-50.37
930701	279A	Cusseta	GA	111.66	228.9	115.0	-3.34
930701	279A	Cusseta	GA	112.52	229.6	115.0	-2.48
ALLO	279A	Cusseta	GA	112.97	229.0	115.0	-2.03
RDEL	277C	Atlanta	GA	97.33	333.7	95.0	2.33
WVEE	277C*	Atlanta	GA	97.33	333.7	95.0	2.33
WQSY	280C3	Hawkinsville	GA	92.17	166.1	89.0	3.17
ALLO	279C3	Arcade	GA	146.39	14.2	142.0	4.39
WDDK	280A	Greensboro	GA	80.21	45.9	72.0	8.21
WPUP	279C3	Royston	GA	150.71	21.4	142.0	8.71
RADD	277C0	Atlanta	GA	97.33	333.7	86.0	11.33
ALLO	279C	Gadsden	AL	244.05	297.6	226.0	18.05
RADD	278A	Irwinton	GA	97.33	333.7	72.0	25.33
WALRFM	281C1	La Grange	GA	102.41	298.7	75.0	27.41
WALR.C	281C1	La Grange	GA	102.41	298.7	75.0	27.41
RDEL	279C1	Gadsden	AL	244.05	297.6	200.0	44.05
WJAD	278C3	Leesburg	GA	145.56	187.1	89.0	56.56
WQEN	279C1	Gadsden	AL	257.84	292.3	200.0	57.84
RADD	276C3	East Dublin	GA	100.71	118.9	42.0	58.71
WULS	279A	Broxton	GA	180.09	148.5	115.0	65.09

EME Communications - Moultrie, GA. U.S.A.

EXHIBIT - 2
Revised clear area
at Cusseta, GA.



EME Communications - Moultrie, GA. U.S.A.

RADD

Latitude: 33-52-19 N
Longitude: 083-15-19 W
Power: 6.00 kW
Channel: 261
Frequency: 100.1 MHz
AMSL Height: 300.85 m
Elevation: 204.48 m
Horiz. Pattern: Omni
Vert. Pattern: No
Prop Model: None

EXHIBIT - 3

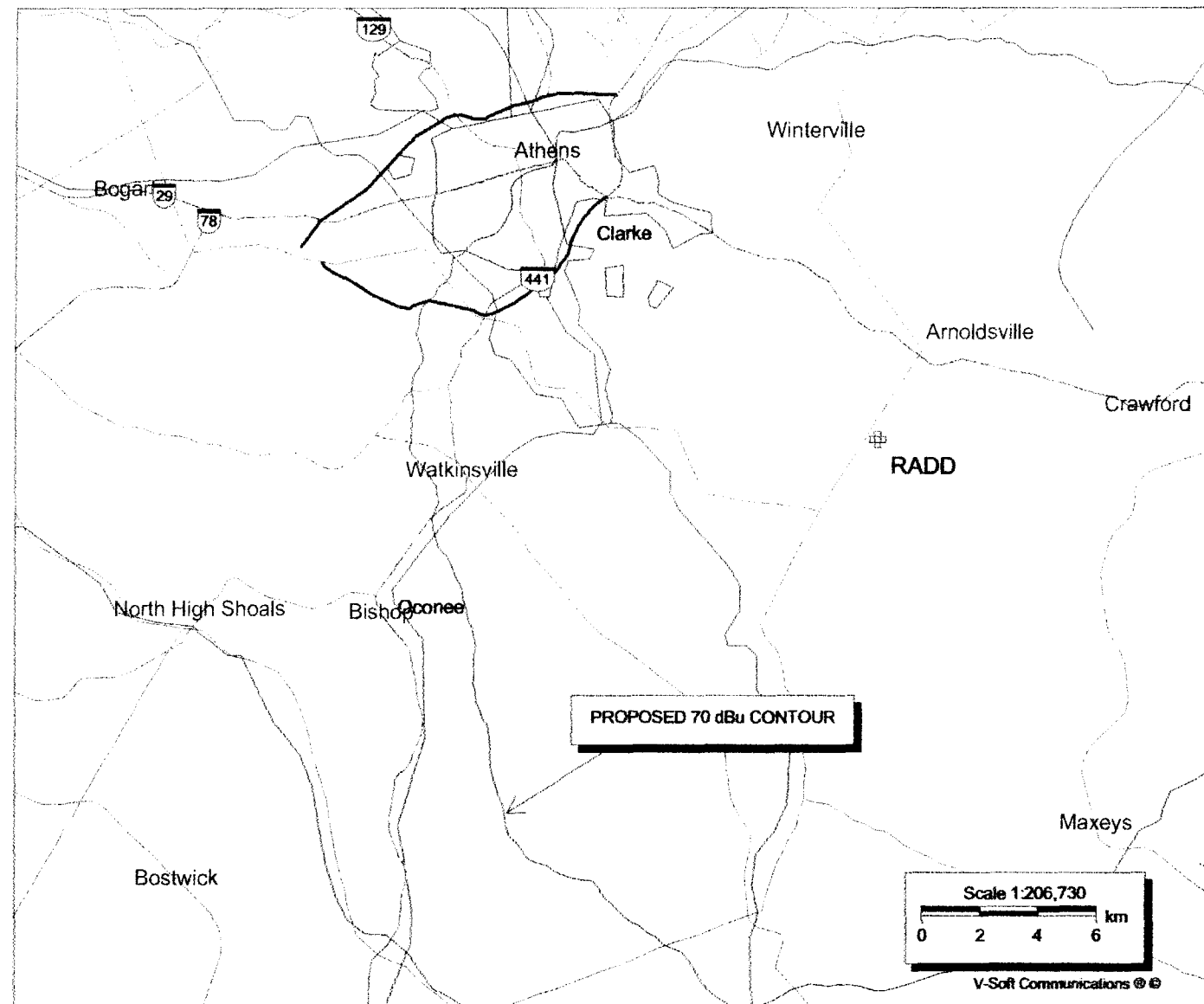


EXHIBIT – 4

**FACILITIES LICENSED WITHIN THE
MACON GEORGIA URBANIZED AREA.**

<u>AM'S</u>	<u>FM'S</u>	<u>TV'S</u>
WBML	WAYS	WNMG
WDDO	WDEN-FM	WGXA
WDEN	WHTA	WMAZ-TV
WLCG	WMKS	WMGT
WMAC	WIBB-FM	WPGA-TV
WNEX	WJTG	
WXKO	WQBZ	
WPAG	WPGAFM	
WAXP	WQMJ	
WNNG	WJZY-FM	
WRNC	WLCG-FM	
	WRBV	

**FACILITIES LICENSED WITHIN THE
ATHENS URBANIZED AREA**

WGAU	WFSH-FM	WUVG
WRFC	WMSL	WGTV
WXAG	WUGA	
	WOUG	
	WBTS	

EXHIBIT – 4

**FACILITIES LICENSED WITHIN THE
MACON GEORGIA URBANIZED AREA.**

<u>AM'S</u>	<u>FM'S</u>	<u>TV'S</u>
WBML	WAYS	WNMG
WDDO	WDEN-FM	WGXA
WDEN	WHTA	WMAZ-TV
WLCG	WMKS	WMGT
WMAC	WIBB-FM	WPGA-TV
WNEX	WJTG	
WXKO	WQBZ	
WPAG	WPGAFM	
WAXP	WQMJ	
WNNG	WJZY-FM	
WRNC	WLCG-FM	
	WRBV	